Rel: September 24, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1190106

Something Extra Publishing, Inc., d/b/a Lagniappe Weekly

v.

Huey Hoss Mack, Anthony Lowery, and Michael Gaull

Appeal from Baldwin Circuit Court
(CV-19-900262)

SHAW, Justice.[1]

Something Extra Publishing, Inc., d/b/a Lagniappe Weekly ("Lagniappe"), the plaintiff below, appeals from a summary judgment

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[1]This case was originally assigned to another Justice on this Court; it was reassigned to Justice Shaw.

entered in favor of the defendants, Baldwin County Sheriff Huey Hoss Mack, and two members of the Baldwin County Sheriff's Office, Colonel Anthony Lowery and Lieutenant Michael Gaull ("the Sheriffs"), in this action alleging that the Sheriffs improperly denied Lagniappe's request for public records in violation of the Open Records Act ("the ORA"), § 36-12-40 et seq., Ala. Code 1975. We affirm.

Facts and Procedural History

In May 2017, Corporal Matt Hunady, a deputy sheriff employed by the Baldwin County Sheriff's Office ("the Sheriff's Office"), responded to the scene of a single-vehicle accident where, ultimately, he fatally shot Jonathan Victor, the driver and sole occupant of the vehicle. The incident was apparently captured on video by various means, including by Cpl. Hunady's bodycamera and on the cellular telephones of civilian eyewitnesses. Following the incident, the Baldwin County Major Crimes Unit ("the Major Crimes Unit") investigated the circumstances of the shooting.[2] In October 2017, a grand jury declined to indict Cpl. Hunady

[2]The Major Crimes Unit is an independent, multijurisdictional law-enforcement agency composed of officers from local law-enforcement

on any criminal charge.

Thereafter, in January 2019, Jason Johnson, a reporter employed by Lagniappe, the publisher of an independent weekly newspaper distributed throughout Baldwin County, sent an email message to Col. Lowery that contained the following:

> "I was hoping to make a records request to the department.
>
> "In the past I've just emailed you and asked for comments or to come review records, but if I was going to file a formal records request under the [ORA], how would I go about that?
>
> "Is there a standard form of some type or should I just send a written letter outlining the nature of the request?"

Col. Lowery replied to Johnson's email as follows: "There is a form to request open records. I need to figure out where to point you. What is the request related to?"[3] In a subsequent email dated January 31, 2019,

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agencies operating within Baldwin County. It was formed to investigate officer-related shootings and capital-murder cases occurring within, and to conduct internal investigations of law-enforcement agencies operating within, Baldwin County.

[3]The record indicates that the Sheriff's Office has an established procedure for the submission of an ORA request, which is initiated by the submission of a completed "Open Records Request Form" available on the

Johnson further explained:

> "I'm trying to request the following under the [ORA]: 'All of the records related to the shooting of Jonathan Victor on May 12, 2017, including but not limited to dash cam, body cam, and third party video; the audio from any 911 calls or radio communications; photographs from the scene; autopsy records; and communications such as emails, text messages, and other forms of messaging.'"[4]

Again, Col. Lowery responded with the following:

> "This is one we continually keep getting asked for. I have included Lt. Michael Gaull in this email. We are getting assistance from our attorney on this making sure we comply with [the ORA]. Lt. Gaull should have more. Keep in mind this is a [Major Crimes Unit] investigation, not ours."

Six days later, Johnson sent another email to Col. Lowery and Lt. Gaull inquiring as to "how [he] might need to proceed with this records request." At that time, Lt. Gaull replied as follows:

> "Thank you for contacting the [Sheriff's Office] regarding your request for public records, however, our agency is unable to process your request at this time. Under the Code of

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Sheriff's Office's public Web site that is then routed to the appropriate internal department.

[4]According to Lagniappe, this particular email constituted its actual request for public records pursuant to the ORA. It appears undisputed that neither Johnson nor anyone else on Lagniappe's behalf ever completed the form referenced in Col. Lowery's original response.

> Alabama, Section 12-21-3.1, law enforcement investigative files are not public records .... In addition, if a court order is granted by a judge to release[ ] the information, please direct the order to [the Major Crimes Unit], [which] is the investigating agency regarding this incident."

Lt. Gaull attached a copy of § 12-21-3.1, Ala. Code 1975 ("the investigative-privilege statute"),[5] to his response. There was apparently no further communication between Lagniappe and the Sheriff's Office.

Lagniappe subsequently sued the Sheriff's Office, Col. Lowery, and Lt. Gaull in the Baldwin Circuit Court. Lagniappe later amended its complaint to omit the Sheriff's Office as a named defendant and to add, instead, Sheriff Mack as a defendant. Lagniappe's complaint, which alleged that the Sheriffs had violated the ORA by failing to produce nonexempt public writings, sought both declaratory and injunctive relief.

After answering Lagniappe's amended complaint, the Sheriffs jointly moved for a summary judgment. In support of that motion, the Sheriffs,

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[5]Subsection (b) of the investigative-privilege statute provides: "Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure."

among other arguments, disputed that Johnson's inquiry amounted to an ORA request and argued that any request should be directed to the Major Crimes Unit; thus, the Sheriffs asserted, Lagniappe lacked "standing" to pursue its claim seeking equitable relief. Alternatively, the Sheriffs, citing § 12-21-3.1(b), disputed that the identified records constituted "public writings" subject to production under the ORA. As support for their motion, the Sheriffs submitted copies of the emails quoted above as well as their affidavit testimony establishing, among other details, that the Major Crimes Unit, rather than the Sheriff's Office, had investigated the referenced incident; that the Major Crimes Unit independently maintained its investigative files to which the Sheriff's Office lacked access; and the Sheriff's Office's procedure for the submission of an ORA request.

Following additional filings and a hearing, the trial court entered a summary judgment in favor of the Sheriffs.[6] Lagniappe appeals.

Standard of Review

[6]The trial court's summary-judgment order did not include the legal holdings or factual findings on which its judgment was based.

> "'"This Court's review of a summary judgment is de novo. Williams v. State Farm Mut. Auto. Ins. Co., 886 So. 2d 72, 74 (Ala. 2003). We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. Rule 56(c), Ala. R. Civ. P.; Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 952-53 (Ala. 2004). In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Wilson v. Brown, 496 So. 2d 756, 758 (Ala. 1986). Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."'
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> "Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Discussion

On appeal, Lagniappe raises three challenges to the trial court's summary judgment in favor of the Sheriffs: that the trial court erred to the extent that it might have concluded that the Sheriffs successfully demonstrated that they did not possess responsive records; that the trial court erred to the extent that it might have concluded that Lagniappe's records request was improperly submitted when, Lagniappe maintains, the Sheriffs nonetheless formally responded; and that the trial court erred to the extent that it might have concluded that certain requested materials were, as the Sheriffs asserted, exempt as law-enforcement investigative reports under § 12-21-3.1(b).

Initially, this Court notes that, under other circumstances, it would be hesitant to conclude that Lagniappe's email inquiries, which appear merely to seek further direction as to how to proceed with a request for records under the ORA, amounted to an actual request pursuant to the ORA, especially when established records-request procedures are in place. See note 3, supra. Nonetheless, because, as Lagniappe argues, the Sheriffs treated Lagniappe's emails as an ORA records request by formally responding, any failure by Lagniappe to properly request

documents pursuant to the ORA appears to be immaterial. Similarly, because Johnson's January 31, 2019, email clearly sought records and information other than what might have been separately maintained by the Major Crimes Unit, we conclude that the Sheriffs' contentions that they lacked access to the Major Crimes Unit's investigative file was also immaterial -- especially because the affidavits of the Sheriffs filed in support of their motion for a summary judgment do not deny that the Sheriff's Office possessed the requested materials.

Lagniappe contends that the "ORA requires Defendants to produce public records in their possession." This is incorrect; the ORA states that "[e]very citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." Ala. Code 1975, § 36-12-40. In addition to acknowledging that separate statutes might provide exceptions to the ORA, § 36-12-40 goes on to state numerous other exceptions. The Sheriffs argue, as they did in their motion for a summary judgment, that the records requested by Lagniappe fall under a statutory exception provided by § 12-21-3.1(b). That Code section states: "Law enforcement investigative reports and related

investigative material are not public records." (Emphasis added.) It then goes on to state that "[l]aw enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure."

Both the term "investigative reports" and the list of "privileged communications" seem to suggest that the exception was crafted with the intention of protecting materials created by law-enforcement officers during the course of a criminal investigation. See Allen v. Barksdale, 32 So. 3d 1264, 1270 (Ala. 2009) (observing "that this Court in Stone[v. Consolidated Publishing Co., 404 So. 2d 678, 681 (Ala. 1981)], recognized a pending criminal investigation as an exception to the [ORA]").[7] The

[7]As recognized in Water Works & Sewer Board of Talladega v. Consolidated Publishing, Inc., 892 So. 2d 859, 866 (Ala. 2004), the judicially created exception in Stone was intended to apply to "'pending criminal investigations.'" Similarly, although not containing the "pending" requirement recognized by the Court in Stone, § 12-21-3.1(f) nonetheless appears to suggest that "a criminal matter is disposed of" by various prescribed means, including "[w]hen the prosecuting authority has presented the matter to a grand jury and a no bill or true bill has been returned." § 12-21-3.1(f)(1). The Sheriffs argue that, under § 12-21-3.1(b), "certain investigative materials can remain exempt from [production under the ORA] even after the case is closed." It is, however, unnecessary for us to decide whether § 12-21-3.1(b) applies to only pending criminal

phrase "related investigative material" that follows "[l]aw enforcement investigative reports," however, is much broader and would encompass not only officer work product but also any materials related to a particular investigation. That would include items of substantive evidence that existed before the investigation began, such as video recordings or documentary evidence relevant to the crime being investigated.[8]

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investigations. Specifically, we note that Lagniappe does not include, among its various arguments on appeal, an argument that the trial court erred in entering a summary judgment for the Sheriffs on the basis that the requested materials are no longer exempt because they are not part of a presently pending criminal investigation. See Tucker v. Cullman-Jefferson Cntys. Gas Dist., 864 So. 2d 317, 319 (Ala. 2003) (stating that issues not raised and argued in brief are waived).

[8]There could be various reasons for extending such broad protections to related items of substantive evidence relevant to a pending criminal investigation, including, among others, the possibility that premature release of such evidence could hamper law-enforcement investigations by alerting potential suspects and disclosing the identities of crucial witnesses and/or victims, thereby rendering them vulnerable to influence, threats, or retaliation. See Stone v. Consolidated Publishing Co., 404 So. 2d 678, 681 (Ala. 1981) ("Recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue

Lagniappe argues that, under the decision in Allen, supra, the materials requested would not fall under § 12-21-3.1(b). In that case, the Court was called on to consider whether the investigative-privilege statute's exemption of law-enforcement investigative reports and related material from public disclosure extended to include incident reports prepared by the Alabama Department of Corrections ("ADOC"). As Lagniappe notes, in rejecting ADOC's claim that the incident reports were, in fact, covered by the investigative-privilege statute, the Court emphasized that exceptions to production under the ORA should be "narrowly construed" in favor of disclosure. Id. at 1271. In Allen, we compared an "incident report," which "documents any incident -- from the mundane to the serious," to "an investigative report ... reflect[ing] a close examination of an incident and a systematic inquiry [that] may lead to criminal prosecution." Id. We held that although the former would not be exempt from production under the investigative-privilege statute, the

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interference.").

latter clearly were. Id.

We do not, however, read our analysis in Allen as establishing any bright-line rule governing production under the investigative-privilege statute that would control the outcome here. Instead, our decision in Allen was born from a comparison of two differing types of reports and the resulting conclusion that one was "investigative" in nature and that the other was, to the extent that it lacked any accompanying suggestion that the described incident was currently under or would result in a criminal investigation, merely documentary. More importantly, in Allen, the Court clearly was not called upon to consider the application of the investigative-privilege statute to substantive evidentiary items relating to an actual criminal investigation.

Here, as explained above, Lagniappe sought records, specifically including

> "[a]ll of the records related to the shooting of Jonathan Victor ..., including but not limited to dash cam, body cam, and third party video; the audio from any 911 calls or radio communications; photographs from the scene; autopsy records; and communications such as emails, text messages, and other forms of messaging."

Lagniappe appears to concede that the investigative-privilege statute applies to exempt at least some of the materials it requested. As the Sheriffs also contended during oral argument before this Court, certain of the requested materials are obviously privileged communications because they constitute "investigative reports, records, field notes, [and] witness statements" that are exempted under § 12-21-3.1(b). To the extent that the Sheriffs also argued that the materials at issue, even if not specifically generated by law-enforcement officers during or for the purpose of a systematic inquiry into a criminal incident, nonetheless fall into the broader "related investigative material" label that the legislature purposefully designated as "not public records," we agree.

All materials requested by Lagniappe are related to the incident regarding Cpl. Hunady, which was the subject of a criminal investigation. The very wording of Lagniappe's request, seeking all the "records related to the shooting," seeks such investigative material. There is no need for affidavits or other evidence to establish what the Sheriffs possessed because all the records that were requested would be covered under § 12-21-3.1(b). Thus, the investigative-privilege exception applies.

Lagniappe argues that "[t]he pending-criminal-investigation exception does not apply to every single responsive record here." Specifically, in Stone v. Consolidated Publishing Co., 404 So. 2d 678 (Ala. 1981), this Court held:

> "Recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interests of the public are some of the areas which may not be subject to public disclosure. Courts must balance the interest of the citizens in knowing what their public officers are doing in the discharge of public duties against the interest of the general public in having the business of government carried on efficiently and without undue interference."

404 So. 2d at 681.

Lagniappe contends that, "[u]nder the Stone balancing test, the public's interest in disclosure [in this case] far outweighs any interest surrounding the carrying out of government business." However, the balancing test in Stone was a Court-created exception to the ORA and is not an exception to § 12-21-3.1(b), which was enacted after Stone was decided. Allen, 32 So. 3d at 1270 ("We are mindful that this Court in Stone recognized a pending criminal investigation as an exception to the

Open Records Act, and that in 1998 the legislature adopted § 12-21-3.1 as a statutory exemption.").

Conclusion

Based on the foregoing, the trial court did not err in entering a summary judgment in favor of the Sheriffs based upon that court's application of the investigative-privilege statute. Accordingly, we affirm that judgment.

AFFIRMED.

Bolin, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Shaw, J., concurs specially.

Wise and Stewart, JJ., concur in the result.

Parker, C.J., dissents.

SHAW, Justice (concurring specially).

I concur in the main opinion, which I believe clarifies what Ala. Code 1975, § 12-21-3.1(b), excludes from the purview of "Open Records Act" ("the ORA"), Ala. Code 1975, § 36-12-40 et seq. The legislature has protected sensitive records related to criminal investigations from premature disclosure, which can have serious ramifications in bringing offenders to justice and protecting victims. However, § 12-21-3.1(b) by no means prevents law-enforcement departments from opening for inspection such records when those ramifications do not exist, and I believe that our law-enforcement officials would utilize their discretion appropriately. Section 12-21-3.1(b) provides a narrow exception to the ORA and is applicable in limited circumstances; its effects need not be exaggerated.

Although, as part of what has been labeled the "Open Records Act," § 36-12-40 by its terms provides for the inspection of "any public writing," it does not provide for the inspection of "records" generally: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." (Emphasis added.) See also Ala. Code 1975, § 36-12-41 ("Every public officer having the

custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing." (Emphasis added)). What constitutes a "public writing" is not defined in the ORA. In describing the substance of what constitutes a "public writing," this Court has stated:

> "The [ORA] does not define the term 'public writing.' However, in Stone v. Consolidated Publishing Co., 404 So. 2d 678, 681 (Ala. 1981), this Court stated with regard to the [ORA] that a 'public writing is such a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status of such business and activities can be known by [the] citizens.' "

Allen v. Barksdale, 32 So. 3d 1264, 1268 (Ala. 2009).

Not all records held by a public agency are " 'reasonably necessary to record the business and activities' " of public officers. Id. (emphasis omitted). Further, as the main opinion holds, to the extent that materials record the business and activities of law-enforcement departments as part of criminal investigations, or are relevant and/or related to criminal investigations, they are statutorily excluded from the definition of "public records" by § 12-21-3.1(b).

As to the form of a "public writing," the language of § 36-12-40 itself, which first appeared in the Alabama Code of 1923, states that it is a "writing." A "writing" has been defined as "[t]he expression of ideas by letters visible to the eye" -- "[i]n the most general sense of the word, 'writing' denotes a document, whether manuscript or printed, as opposed to mere spoken words." Black's Law Dictionary 1235 (2d. ed. 1910).[9] Subsequent amendments to what is now § 36-12-40 added references to "records," but the language of the Code section as it now exists suggests no change in the form of the records to which the ORA applies. Although more recent dictionaries might include electronic audio and video recordings under the definition of "writing," such was clearly not the case when the predecessor to § 36-12-40 was originally enacted. As Justice Mitchell has noted,

> "[b]ecause '[w]ords change meaning over time, and often in unpredictable ways,' it is important to give words in statutes the meaning they had when they were adopted to avoid

[9]"Public records" as defined for other portions of the Code are described as "all written, typed or printed books, papers, letters, documents and maps. Ala. Code 1975, § 41-13-1. Like the "public writing" referred to in § 36-12-40, those are written documents.

> changing what the law is. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, § 7, at 78 (Thomson/West 2012) (explaining the fixed-meaning canon of interpretation) .... Accordingly, whenever we use dictionaries to help us interpret statutes, it is critical to use dictionaries of the proper vintage to better understand the meaning of relevant terms at the time of their adoption."

Ex parte Tutt Real Estate, LLC, [Ms. 1190963, Mar. 26, 2021] ___ So. 3d ___, ___ (Ala. 2021) (Mitchell, J., concurring specially).

One could argue that, considering the court-provided definition of the substance of what constitutes a "public writing," see Allen, supra, audio and video recordings would be included in that definition, but the statutory definition of the form of a "public writing" -- i.e., what is open to inspection under the ORA -- excludes such recordings. It thus would appear that audio and video recordings have never met the definition of a "writing" for purposes of the ORA. I do not mean to suggest that we must accept that definition of a "public writing," which, given the holding of the main opinion, is an issue this Court has pretermitted, thus avoiding a close review of the grammar and wording of § 36-12-40. However, recognizing the changes in technology that have occurred over the last century, and the means by which we today "record" information, it is

incumbent upon the legislature to update the language of the ORA if it desires to ensure records such as audio and video recordings are included within the purview of the ORA.

I further note that, as discussed in the main opinion, there was a formal process for requesting records from the Baldwin County Sheriff's Office. That process was not followed in this case, but such noncompliance was waived. If there is a clear process for making an ORA request, then deviations from that process should be avoided. Otherwise, informal, vague, misdirected, or unserious requests to inspect records could render public officials subject to suits seeking declaratory or injunctive relief under the ORA. Such requests might further result in an incomplete or irregular record that could hamper attempts by the public to enforce the requirements of the ORA.

STEWART, Justice (concurring in the result).

The burden of establishing the applicability of a privilege asserted in response to a request under the Alabama Open Records Act ("the ORA"), § 36-12-40 et seq., Ala. Code 1975, falls on the state actors who assert it. Chambers v. Birmingham News Co., 552 So. 2d 854, 856-87 (Ala. 1989). Moreover, exceptions to the ORA -- including exceptions asserted under § 12-21-3.1(b), Ala. Code 1975, for "[l]aw enforcement investigative reports and related investigative material" -- must be narrowly construed in favor of disclosure of public records. Allen v. Barksdale, 32 So. 3d 1264, 1274 (Ala. 2004). Consistent with the foregoing principles, a court assessing a parties' invocation of a purported privilege to a request under the ORA may require more that just the assertion of the privilege itself. Stated otherwise, the mere assertion that an exception to the ORA applies does not always, by itself, meet that burden.

To assist with judicial review of a determination regarding whether a privilege to a request under the ORA applies, parties and trial courts should look to the procedures available to parties involved in discovery disputes in which a privilege is asserted, which are set forth in Rule 26(b)

and (c), Ala. R. Civ. P. At the request of either party or on the trial court's own initiative, those same procedures, including the production of a privilege log, can be employed in lawsuits in which a state actor asserts an exception to a request made to it under the ORA. In addition, the trial court has the authority, upon request of either party, to conduct an in camera review of the information purported to be exempt from the ORA to determine whether the exception applies. See Ex parte May, 393 So. 2d 1006, 1007 (Ala. 1981)("[T]he judge must ultimately decide whether the information or material sought is discoverable. If [work product or privileged] material is sought, in camera examination of the material may be required.").

Unfortunately, the aforementioned procedures were not invoked in the present case, leaving this Court and the trial court with a limited summary-judgment record consisting of three affidavits and a series of emails, none of which provide detail on the purported application of the law-enforcement-investigation exception to the ORA set forth in § 12-21-3.1(b). In fact, the affidavits submitted in support of the motion for a summary judgment barely acknowledge § 12-21-3.1(b). Instead, those

affidavits appear to have been offered mostly in support of the defendants' argument that the Baldwin County Major Crimes Unit, and not the Baldwin County Sheriff's Office, is the entity to which Something Extra Publishing, Inc., d/b/a Lagniappe Weekly ("Lagniappe") should have directed its ORA request and that the Baldwin County Sheriff's Office had specific procedures for processing ORA requests. Without more, I am unable to conclude whether or not the law-enforcement-investigation exception to the ORA set forth in § 12-21-3.1(b) applies in the present case.

In my view, this case can be resolved under the well-established standard of review applicable to summary judgments. A party seeking a summary judgment bears the burden of establishing a prima facie case that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Only after the movant makes that showing does the burden shift to the nonmovant to produce substantial evidence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin Cnty., 538 So. 2d 794, 797-98 (Ala. 1989). The defendants asserted that they were entitled to a summary judgment on the ORA request for the

reasons they set out in their affidavits. At that point, the burden shifted to Lagniappe to establish the existence of a genuine issue of material fact. The record on appeal contains no such evidence produced by Lagniappe in opposition to the defendants' summary-judgment motion. "'If the nonmovant cannot produce sufficient evidence to prove each element of its claim, the movant is entitled to a summary judgment, for a trial would be useless.'" Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999)(quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989)(Houston, J., concurring specially)). I, therefore, would affirm the trial court's summary judgment on the aforementioned basis. Accordingly, I concur in the result.

PARKER, Chief Justice (dissenting).

Today's decision works a drastic change in this Court's investigative-privilege jurisprudence. That change is not supported by a careful interpretation of the text of the investigative-privilege statute or a proper application of this Court's precedent.

I. The statutory text

The investigative-privilege statute provides:

> "Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure."

§ 12-21-3.1(b), Ala. Code 1975. The statute's first sentence sets forth two categories of records that are protected from disclosure: "[l]aw enforcement investigative reports" and "related investigative material." The main opinion focuses on the second category, so I will too.

When we interpret a short phrase like "related investigative material," it is important to examine the meaning of each of its words within the wider context of the statute's language. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 2, at

56 (Thomson/West 2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."); id. § 26, at 174 ("If possible, every word ... is to be given effect ...."). Because this phrase is a noun ("material") preceded by two adjectives that modify it ("related" and "investigative"), I will examine the words in reverse order.

"[M]aterial," in the sense used by the statute, means "[i]nformation, ideas, data, documents, or other things that are used in reports, books, films, studies, etc." Black's Law Dictionary 1170 (11th ed. 2019). Thus, "material" in the statute's second category is broader than "reports" in the first. Indeed, in the context of public records, "material" is probably as broad as "records" itself.

However, "material" is qualified by "investigative." This adjective means "of or concerned with investigating something." Oxford Dictionary of English 920 (3d ed. 2010). "Investigating," in turn, is derived from the verb "investigate," which means "to observe or study by close examination and systematic inquiry," Merriam-Webster's Collegiate Dictionary 659 (11th ed. 2020), or, more specifically, to "carry out a systematic or formal

inquiry to discover and examine the facts of (an incident, allegation, etc.) so as to establish the truth," Oxford Dictionary of English 920. Thus, "investigative material" refers to material that concerns the carrying out of a systematic or formal inquiry into some event or situation.

Most importantly, "investigative material" is qualified by the adjective "related." Now, "related," standing alone, can have an extremely broad meaning. Black's defines it as "[c]onnected in some way; having relationship to or with something else." Black's Law Dictionary 1541. But of course all points of reality can properly be seen as connected, through some series of links, to all other points. Thus, as one scholar put it in what has become known as the first law of geography, "everything is related to everything else." Waldo R. Tobler, A Computer Movie Simulating Urban Growth in the Detroit Region, 46 Economic Geography 234, 236 (1970). Or as the United States Supreme Court observed in a federal-preemption case,

> "one might be excused for wondering, at first blush, whether the [statute's] words of limitation ('insofar as they ... relate') do much limiting. If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally,

> universally, relations stop nowhere []' ....
>
> > "... [A]n uncritical literalism is [little] help ... in trying to construe 'relate to.' ... [I]nfinite relations cannot be the measure of pre-emption ...."

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655-56 (1995). Without extrinsic boundaries, "the term would stretch to the horizon and beyond." Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1218 (11th Cir. 2011). Because of this inherent indeterminacy, experience teaches that "related" is one of the most vague and malleable words in the legal lexicon. By itself, it can include everything or nothing, solely in the eye of the beholder. "Related" is thus functionally meaningless unless it is fettered to its context. Consequently, in discerning the meaning of a specific use of this word, examination of context is paramount. See Empire HealthChoice Assurance, Inc. v. McVeigh, 396 F.3d 136, 147 (2d Cir. 2005) ("[T]he precise meaning of the vague term 'relates to' depends on the larger statutory context."); Scalia & Garner, supra, § 24, at 167 ("Context is a primary determinant of meaning."). So, here, the first question to ask about "related" investigative material is: "Related to what?" The context makes the answer obvious:

"[l]aw enforcement investigative reports and related investigative material." § 12-21.3.1(b) (emphasis added). Given the sequence and syntax of the quoted phrase, "related," even at its broadest, can only mean "related to investigative reports." And it cannot mean "related to an investigation," for two reasons. For one, the word "investigation" does not occur within the preceding portion of the statute's first sentence; the preceding noun is "reports." And second, to read "related" to mean "related to an investigation" would cause "related" to be redundant with its sister modifier "investigative" (which itself means "related to an investigation"), which would be at odds with the surplusage canon of statutory interpretation. See Scalia & Garner, supra, § 26, at 174 ("If possible, every word and every provision is to be given effect .... None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.").

Thus far, in light of the meaning of the individual words, I have established that "related investigative material," at its broadest, could theoretically mean records that both (1) concern the carrying out of a systematic or formal inquiry into some event or situation and (2) relate to

an investigative report. But that's not all.

To fully examine the meaning of the phrase "related investigative material," the full text of the investigative-privilege statute must be taken into account. See Scalia & Garner, supra, § 24, at 167 ("Whole-Text Canon": "The text must be construed as a whole."). Again, the statute reads:

> "Law enforcement investigative reports and related investigative material are not public records. Law enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings are privileged communications protected from disclosure."

§ 12-21-3.1(b). To make sense out of the statute's two sentences, they must be read together, in harmony. See 73 Am. Jur. 2d Statutes § 125 (2012) ("It is ... a familiar policy in the construction of terms of a statute ... to adopt that sense of the words which best harmonizes with the context."). As noted above, the first sentence protects two categories from disclosure: "investigative reports" and "related investigative material." The second sentence then lists various types of protected records: "reports," "records," "field notes," "witness statements," and "other investigative writings or recordings." The first type, law-enforcement investigative "reports," is

synonymous with the "investigative reports" category in the first sentence.

As for the remaining types -- records, field notes, witness statements, and other investigative writings or recordings -- they must be understood as fitting within the second category, "related investigative material." This is because the second sentence's list is bookended by two modifiers: "[l]aw enforcement investigative reports, records, field notes, witness statements, and other investigative writings or recordings." (Emphasis added.) Under the series-qualifier canon, "[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." Scalia & Garner, supra, § 19, at 147.[10] Here, the series ("reports, records, field notes, witness statements, and other") is modified by both a prepositive modifier ("[l]aw enforcement investigative") and a postpositive modifier ("investigative writings or recordings"). Both modifiers contain the adjective "investigative"; therefore, "investigative"

[10]A prepositive modifier is "put before" the words it modifies, see Merriam-Webster's Collegiate Dictionary 981 (11th ed. 2020) (defining "prepositive"), whereas a postpositive modifier is " 'positioned after' what [it] modif[ies]," see Scalia & Garner, supra, § 19, at 148.

qualifies the whole series. (The Legislature would have conveyed the same meaning if it had written, "[l]aw enforcement investigative reports, law enforcement investigative records, law enforcement investigative field notes, law enforcement investigative witness statements, and other law enforcement investigative writings or recordings.") Further, "investigative" must mean the same thing in both of the statute's sentences. See Scalia & Garner, supra, § 25, at 170 (explaining the "presumption of consistent usage": "A word or phrase is presumed to bear the same meaning throughout a text ...."); 73 Am. Jur. 2d Statutes § 140 (addressing "[i]dentical terms or expressions in same statute"). Thus, the second sentence's list of types of "investigative" records (other than reports) illustrates what the first sentence means by "related investigative material."

Further, by illustrating that second category, the list necessarily suggests the category's contours. Cf. Scalia & Garner, supra, § 31, at 195 ("Associated words bear on one another's meaning ...."); United States v. Williams, 553 U.S. 285, 294 (2008) ("[A] word is given more precise content by the neighboring words with which it is associated."). What are

those contours? Keeping in mind that only records that are "related" to an investigative report are within the second category, a commonality among the list's first three relevant types emerges. Investigative "records, field notes, [and] witness statements" all appear to reflect law-enforcement officers' efforts and discoveries within an investigation. That is, these types of records are "related" to an investigative report in a particular sense: They are records created by officers in the course of their investigation, intermediate records that might ultimately result in a report. Now, the fourth listed type of record, the catch-all "other investigative writings or recordings," could conceivably be broader. However, the ejusdem generis canon dictates that that fourth type be construed to include only records that have the same common characteristic as the first three. See Scalia & Garner, supra, § 32, at 199 ("Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (ejusdem generis)."). Therefore, the second sentence's list of examples of "related investigative material" strongly suggests that that category includes only records, created by law-

enforcement officers, that reflect their efforts in an investigation. In this way, the main opinion's initial hunch, which it immediately rejects, turns out to have been on track: The statute "protect[s] materials created by law-enforcement officers during the course of a criminal investigation," ___ So. 3d at ___.

Although broader interpretations of "related investigative material" might be plausible, the above interpretation is the most reasonable one in light of the linguistic and syntactical relationships within the text itself. Thankfully, however, we are not left to speculate about the viability of any broader interpretations, because this Court's own precedent tells us what to do next.

II. This Court's precedent on how to interpret the investigative-privilege statute

This Court has repeatedly emphasized that exceptions to the Open Records Act must be narrowly construed in favor of disclosure of records. See Chambers v. Birmingham News Co., 552 So. 2d 854, 856-57 (Ala. 1989); Blankenship v. City of Hoover, 590 So. 2d 245, 248 (Ala. 1991); Birmingham News Co. v. Muse, 638 So. 2d 853, 855 (Ala. 1994); Allen v.

Barksdale, 32 So. 3d 1264, 1271, 1274 (Ala. 2009); Tennessee Valley Printing Co. v. Health Care Auth. of Lauderdale Cnty., 61 So. 3d 1027, 1039 (Ala. 2010); Health Care Auth. for Baptist Health v. Central Alabama Radiation Oncology, LLC, 292 So. 3d 623, 633-34 (Ala. 2019). Indeed, the main opinion seems to acknowledge this point. See ___ So. 3d at ___. In Allen, a division panel of this Court explained the reason for this narrow construction:

> "Citizens are entitled to information regarding the affairs of their government. Alabama's Open Records Act first appeared in the 1923 Code of Alabama and represents a long history of openness. The Open Records Act is remedial and should therefore be construed in favor of the public. ... The exceptions to the Open Records Act should be strictly construed, because the purpose of the Open Records Act is to permit the examination of public writings and records."

32 So. 3d at 1274.

Also in Allen, this Court emphasized that this narrow construction must be applied to the investigative-privilege statute. Id. at 1271. In fact, the Court repeated the admonition three times in the same paragraph:

> "[The investigative-privilege statute] is ... an exception to the Open Records Act and thus should ... be narrowly construed. This conclusion is in keeping with the broad general policy of open government. The document reflecting the work of

> government belongs to the public, and, although exceptions to disclosure of such documents are necessary, any exceptions should be narrowly construed. In other words, the Open Records Act favors disclosure, and exemptions to that Act, including those created by statute, must be narrowly construed."

Id. (emphasis added).

The Court then proceeded to illustrate what narrow construction of the investigative-privilege statute looks like. In Allen, the Alabama Department of Corrections ("ADOC") had denied requests for "incident reports" and "investigative reports" regarding violence in certain ADOC facilities. Id. at 1266-67. Incident reports were written by corrections officers and could document anything that happened in a correctional facility. Id. at 1269-71. Incident reports of serious incidents could be forwarded to the intelligence and investigations ("I & I") division, which would then conduct an investigation and produce an investigative report. Id. at 1269-70.

Before analyzing whether the two types of reports were protected by the investigative-privilege statute, the Court recognized that the statute "exempts law-enforcement investigative reports and related material from

public disclosure." Id. at 1271 (emphasis added). The Court then held that investigative reports by the I & I division were protected but that incident reports were not. Id. The Court focused on the respective functions of the reports: I & I reports "reflect[ed] a close examination of an incident and a systematic inquiry and [could] lead to criminal prosecution," whereas incident reports "document[ed] any incident -- from the mundane to the serious." Id. Inherent in that contrast was a partial clarification of what "investigative," narrowly construed, means: Records (whether reports or other material) that "reflect[] a close examination of an incident and a systematic inquiry and may lead to criminal prosecution" are investigative, but records that "document[] any incident -- from the mundane to the serious" -- are not. Further, by holding that incident reports were not protected, the Court necessarily concluded that incident reports were neither "investigative reports" nor "related investigative material."

That last point merits close reflection. The Court's conclusion that incident reports were not "related investigative material" sheds light on how "related" the material must be to an investigative report to qualify for

protection. Incident reports that, upon forwarding, resulted in I & I reports, would certainly have been related to those I & I reports in the sense that the incident reports were part of the process of observation and information collection that culminated in the I & I reports. But under Allen, that kind of relatedness is not enough. Rather, Allen requires something closer; how much closer Allen does not tell us, but it at least tells us what kind of relatedness does not qualify.

To summarize, Allen gives us two valuable insights into what "related investigative material," narrowly construed, does not include. Material that merely documents an incident -- whether mundane or serious -- is not included. And material that is merely part of a process of observation and information collection, even if that process ultimately leads to an investigative report, is not included.

Further, to return to Allen's emphatic and fundamental point, it is not sufficient that a particular construction of "related investigative material" be merely plausible. It must be narrow. Therefore, whatever the range of options for construing "related investigative material," only those options that can fairly be characterized as narrow -- consistent with

Allen's illustration of narrowness -- are even possibly correct.

Putting the pieces together from the above textual and precedential analysis, I believe that the best interpretation of "related investigative material" is as follows. "[R]elated investigative material" includes only records, created by law-enforcement officers, that reflect their efforts in an investigation. It does not include records that merely document an incident or records that are merely part of a process of observation and information collection.

Now, applying this interpretation to the facts of this case is complicated by the fact that the Sheriffs[11] did not disclose any records, or even whether they possessed any records, that were responsive to Lagniappe's request. Thus, the only facts available for analysis -- and the only facts on which the Sheriffs' motion for a summary judgment could have been based -- are the general types of records listed in Lagniappe's e-mail. Lagniappe requested

[11]Like the main opinion, I refer to as "the Sheriffs" three members of the Baldwin County Sheriff's Office: Sheriff Huey Hoss Mack, Colonel Anthony Lowery, and Lieutenant Michael Gaull.

> "[a]ll of the records related to the shooting of Jonathan Victor on May 12, 2017, including but not limited to dash cam, body cam, and third party video; the audio from any 911 calls or radio communications; photographs from the scene; autopsy records; and communications such as emails, text messages, and other forms of messaging."

Therefore, the Sheriffs had the summary-judgment burden to show that, as to each listed type of record, any records that would have been responsive to that type were "related investigative material" (or "investigative reports"). In other words, the Sheriffs had to show that all of the listed types, on their face, consisted solely of "related investigative material."

A casual review of the list makes obvious that the Sheriffs could not have shown that. First, nothing about the broad category "[a]ll of the records related to the shooting" even suggests that it contained only officers' records reflecting their investigation -- of the shooting or of anything else. Second, any shooting-related "dash cam, body cam, and third party video" and "audio from any 911 calls or radio communications" would likely have been contemporaneous recordings of events, not officers' records reflecting their investigation. Indeed, those recordings would

likely have merely documented incidents (the underlying events themselves), precisely the kind of records that are not included in "related investigative material." At best, those recordings would likely have been merely part of a process of observation and information collection, also not included. Third, "photographs from the scene" of the shooting, if taken by officers, could have reflected their investigative efforts. That listed type was worded broadly enough, however, that it could have included photographs that were taken by others or were taken before the investigation. Fourth, "autopsy records" would have qualified only to the extent that they reflected officers' investigative efforts, such as if officers were significantly involved with the autopsy. Notably, coroners are not ordinarily law-enforcement officers. See §§ 36-21-40(3) and (4), 22-19-81, Ala. Code 1975; 18 Am. Jur. 2d Coroners § 1 (2015). Fifth, the final broad type -- shooting-related "communications such as emails, text messages, and other forms of messaging" -- could easily have included a myriad of communications that reflected things other than officers' investigative efforts. Therefore, given the meager facts before the circuit court, it could not properly have ruled that all records responsive to the request would

have been "related investigative material."

III. How the main opinion errs

The main opinion functionally disregards all the principles I have outlined above. Without any significant textual or precedential analysis, the opinion simply concludes that the phrase "related investigative material" "encompass[es] ... any materials related to a particular investigation," "includ[ing] items of substantive evidence that existed before the investigation began, such as video recordings or documentary evidence relevant to the crime being investigated," ___ So. 3d at ___, as well as "related items of substantive evidence relevant to a pending criminal investigation," id. n.8. That sweeping conclusion is flawed for several reasons.

First, the main opinion construes the word "related" in a manner contrary to the statute's text. Specifically, the opinion treats "related" as meaning "related to a particular investigation," id. at ___ (emphasis added), or "related items ... relevant to a pending criminal investigation," id. n.8 (emphasis added). That is demonstrably incorrect. As I have shown above, the syntax of the statute's first sentence dictates that "related"

means related to an "investigative report[]" (emphasis added), not merely related to an investigation.

Second, the main opinion misses the mark by concluding that "certain of the requested materials are obviously privileged communications because they constitute 'investigative reports, records, field notes, [and] witness statements' that are exempted under § 12-21-3.1(b)." ___ So. 3d at ___. The opinion does not tell us what "certain ... requested items" it is referring to. Indeed, we don't even know what "materials [are] at issue," ___ So. 3d at ___, because the Sheriffs have not even disclosed whether they have any responsive items. Apparently, similar to my analysis above, the main opinion is attempting to link certain types of records listed in Lagniappe's request (dash-cam, body-cam, and third-party videos; 9-1-1-call and radio audio; crime-scene photographs; autopsy records; and emails, text messages, and other messages) with types of records listed in the statute's second sentence ("investigative reports, records, field notes, [and] witness statements"). Although, as I have noted above, there might be some plausible links between the two lists, they are far short of "obvious[]." And the opinion

fails to connect the dots for us, or even to tell us which dots are to be connected.

Third, the main opinion tries to bring in public-policy concerns through the back door. In an attempt to bolster its sweepingly broad construction of "related investigative material" as including all pre-investigation evidence of the crime itself, the opinion notes "the possibility that premature release of such evidence could hamper law-enforcement investigations by alerting potential suspects and disclosing the identities of crucial witnesses and/or victims, thereby rendering them vulnerable to influence, threats, or retaliation." ___ So. 3d at ___ n.8. The opinion cites Stone v. Consolidated Publishing Co., 404 So. 2d 678 (Ala. 1981), which relied on this type of public-policy reasoning in allowing for judicially created exceptions to the Open Records Act, including a pending-criminal-investigation exception. But the investigative-privilege statute later replaced that judicially created exception. See Water Works & Sewer Bd. of Talladega v. Consolidated Publ'g, Inc., 892 So. 2d 859, 865-66 (Ala. 2004). Thus, the static text of the statute now binds us, regardless of whether it comports with our dynamic views of public policy. Cf. Health

Care Auth. for Baptist Health v. Central Alabama Radiation Oncology, LLC, 292 So. 3d 623, 636 (Ala. 2019) ("We will not curtail the application of the ... language of the [Open Records Act] based on a vague notion that a party's request violates the spirit of the [Act]."). We must interpret -- guided by this Court's soundly reasoned precedent -- what the Legislature has said, not substitute what we would have said.[12]

Fourth, the main opinion sweeps into the protection of "related investigative material," "items of substantive evidence that existed before

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[12]As for the ability of courts to create exceptions to the Open Records Act based on public policy, the Act provides: "Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute." § 36-12-40 (emphasis added). One would think that that language precludes judicially created exceptions, but his Court has held that the Act does not, see Stone, 404 So. 2d at 681; Chambers v. Birmingham News Co., 552 So. 2d 854, 856 (Ala. 1989); Water Works, 892 So. 2d at 865-66. Nevertheless, that point is now moot because the Act itself now effectively allows judicially created exceptions, see § 36-12-40 (as amended in 2004) ("[R]ecords the disclosure of which would otherwise be detrimental to the best interests of the public shall be exempted from this section." (enacting almost verbatim Stone's catch-all language in its list of exceptions, see 404 So. 2d at 681)). But the Sheriffs have not traveled under that part of the Act, nor have they argued that the 2004 amendment resurrected any part of Stone's pending-criminal-investigation exception that had been supplanted by the investigative-privilege statute.

the investigation began, such as video recordings or documentary evidence relevant to the crime being investigated." ___ So. 3d at ___. Inclusion of those items is inconsistent with a careful application of Allen. Items of evidence created before an investigation began are related to an investigative report only in the loosest sense. And they are precisely the kind of items that Allen excludes from the protection of the statute. Under Allen, records that merely document an incident -- which is what pre-investigation video recordings and "documentary evidence relevant to the crime" do -- are not protected. Likewise, under Allen, records are not protected if they are merely part of a process of observation and information collection, even if that process ultimately leads to an investigation. Items of pre-investigation substantive evidence are, at best, part of such a process. More likely, they are simply items that directly evidence the underlying events of the crime. And if evidentiary items created in the pre-investigation observation-and-collection process are not protected under Allen, then a fortiori items created even before that process are not protected.

Fifth, the main opinion tries to brush aside Allen, the seminal case

on this statute, with the distinction that, "in Allen, the Court clearly was not called upon to consider the application of the investigative-privilege statute to substantive evidentiary items relating to an actual criminal investigation." ___ So. 3d at ___. It is not clear why that factual distinction makes a legal difference, and the opinion does not favor us with an explanation. Perhaps it is that pre-investigation items of substantive evidence are more "related" to an investigation than Allen's pre-investigation incident reports were? If so, that cannot be a correct application of the statute. As I have shown above, (1) "related" means related to an investigative report, not merely an investigation, and (2) underlying substantive evidence is even less directly related to investigative reports than the Allen incident reports were. Indeed, the main opinion itself highlights that second point when it states, "All materials requested by Lagniappe are related to the [shooting] incident ..., which was the subject of a criminal investigation," ___ So. 3d at ___. That means that any items of substantive evidence were three steps removed from any investigative report: The items were related to the incident, which was the subject of an investigation, which (presumably)

was the subject of a report.

Finally and most importantly, the main opinion openly ignores this Court's strong admonition in Allen that the investigative-privilege statute must be narrowly construed. Although the main opinion pays passing lip service to that directive, see ___ So. 3d at ___, the opinion repeatedly refers to the statute's "related investigative material" category as "broad," "broader," or "much broader," ___ So. 3d at ___ & n.8, ___. And those words are not vain utterances; they describe exactly what the opinion does when it drastically expands "related investigative material" to exempt virtually all evidence in the hands of law-enforcement agencies. Ponder the scope of today's decision: The statute will now hide from the public eye "any materials related to a particular investigation"; all "items of substantive evidence that existed before the investigation began, such as video recordings or documentary evidence relevant to the crime"; and all "materials ... [that] are related to [an] incident ... [that] was the subject of a criminal investigation." ___ So. 3d at ___, ___.

The sweep of those pronouncements is breathtaking. In essence, all evidence in the possession of law-enforcement agencies, whether created

by the agency or received from others, is now exempt from citizens' statutory right to access public records. Whatever that interpretation of the statute can be called, it cannot be called a narrow construction in favor of open records that Allen requires. Further, it creates precisely the result that we cautioned against in Water Works: "[A] record that would ordinarily be subject to disclosure under the Open Records Act does not become private simply because it is given to law-enforcement personnel." 892 So. 2d at 866 n.4. Under today's decision, to be exempted, a record need only be given to law-enforcement personnel and be somehow "related," no matter how tenuously, to a criminal investigation. Even the Sheriffs are circumspect enough not to advocate for that position:

> "To be clear, the [Sheriffs] are not asserting that [the investigative-privilege statute] provides a blanket exception for any and all materials that have been gathered by a law enforcement entity during the course of an investigation. Clearly, such a position would run afoul of this Court's instruction that the exception[] set forth in [the statute] should be narrowly construed. [Allen], 32 So. 3d at 1271."

Sheriffs' brief at p. 43.[13]

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[13]The same point applies under the analogous attorney-client privilege. A record is not privileged merely because a client gives it to his

With one sweeping stroke, today's decision spells the end of public access to law-enforcement records that are connected in any way to an investigation. Hidden now from the public eye are body-cam videos, dash-cam videos, 9-1-1 recordings, and anything else that is remotely connected to a crime or even potential crime. After today, as to law-enforcement agencies at least, the statute might as well be titled the Closed Records Act.

The special concurrence's protestations do nothing to lighten this heavy shroud. Of course government agencies are free to disclose records voluntarily, but that is not the point of the Open Records Act. Like law in general, the Act exists to compel people to do what they will not do voluntarily. So the fact that some people do not need the prod of the law in no way lessens the harm of removing that prod from those who do. Further, it will not do to protest that the investigative-privilege statute is but one small exception to the Open Records Act. It is the statute that

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attorney. United States v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) ("It goes without saying that documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer.").

determines the public's access to law-enforcement records; it is the statute at issue in this case; and if this Court's interpretation of a statute is wrong, it is no answer to say that the error is limited to the statute being interpreted. Moreover, the concurrence's attempt to downplay the effect of today's decision will not be borne out by history. Because of its broad scope, the decision will be relied on by every smart lawyer who must defend any denial of a public-records request by a law-enforcement agency. And nothing in the decision gives any reason to believe that such a defense will ever lose.

I cannot sit idly by while this Court shrinks a legal right of the people of Alabama to the vanishing point. And I especially cannot do so when that shrinkage flies in the face of text and precedent. If the public's access to law-enforcement records is to be eviscerated via the investigative-privilege statute, that may be a right of the Legislature, but the statute's language as it stands today cannot bear that load. Now, the Court's decision leaves only a clouded future -- and perhaps the Legislature -- to deal with the damage.